

(2)
No. 91-179

Supreme Court, U.S.

FILED

NOV 18 1991

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In the Supreme Court of the United States

OCTOBER TERM, 1991

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

EARL J. REOPELL

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a member of the United States Army Reserve whose state employer unlawfully suspended him from duty, in violation of the Veterans' Reemployment Rights Act, 38 U.S.C. 2022, may be awarded prejudgment interest "to compensate [him] for any loss of wages or benefits suffered by reason of such employer's unlawful action."

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-479

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

EARL J. REOPELL

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A26, is reported at 936 F.2d 12. The opinions of the district court, Pet. App. B1-B7, C1-C6, D1-D19, E1-E27, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1991. A petition for a writ of certiorari was filed on September 16, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).¹

¹ Although petitioner cites 28 U.S.C. 1257, Pet. 3, this Court's jurisdiction is properly invoked under 28 U.S.C. 1254(1).

STATEMENT

The facts of this case are undisputed. In 1984, respondent, a State Police Trooper employed by petitioner, enlisted in the United States Army Reserve without petitioner's permission. Respondent was accordingly suspended from his employment for 30 days without pay. Pet. App. A4. He brought this action in the United States District Court for the District of Massachusetts under the Veterans' Reemployment Rights Act (VRRA), 38 U.S.C. 2021, *et seq.*² The VRRA provides in relevant part that a state employee, such as respondent, "shall not be denied * * * any * * * incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." 38 U.S.C. 2021(b)(3). If an employer, "who is a private employer or a State or political subdivision thereof," violates Section 2021(b)(3), the district court is authorized to order that employer "to compensate [the covered] person for any loss of wages or benefits suffered by reason of such employer's unlawful action." 38 U.S.C. 2022.

The district court found that the suspension of respondent violated the VRRA, and petitioner does not contest that finding in this Court. The court awarded respondent \$3,260.41 in lost wages under the Act, and the parties stipulated that the only remaining issue was the availability of prejudgment interest on the backpay award.³ On cross-motions for summary

² Pursuant to 38 U.S.C. 2022, the United States Attorney for the District of Massachusetts represented respondent in his action.

³ The parties stipulated that if interest were payable, the amount due as of February 28, 1990, would be \$1,788.01, and further interest would accrue at a rate of 8% thereafter. Pet. App. B2.

judgment, the district court held that the Eleventh Amendment barred an award of interest against petitioner. Pet. App. B2-B7.

The court of appeals reversed. In reliance on this Court's decision in *Missouri v. Jenkins*, 491 U.S. 274 (1989), the court of appeals concluded that there was no "strict requirement that prejudgment interest" must be "*expressly* sanctioned by Congress" before a plaintiff may recover it from a State pursuant to a federal statute that unmistakably abrogates the State's Eleventh Amendment immunity against a compensatory award. Pet. App. A14. Rather, once Congress has unequivocally abrogated Eleventh Amendment immunity from a suit for compensatory relief, the question whether interest is includable is one of statutory construction. Pet. App. A15. The court of appeals acknowledged that this Court has recognized a special "no-interest rule" in suits against the federal government, *Library of Congress v. Shaw*, 478 U.S. 310 (1986), which reflects a long standing presumption that Congress does not intend to permit recovery of interest against the federal government absent an express provision to the contrary. The court of appeals rejected petitioner's claim that the presumption is applicable to the interpretation of federal laws abrogating the sovereign immunity of States. The court reached this result in reliance on this Court's statement in *Missouri v. Jenkins*, 491 U.S. at 281 n.3, that the rule of construction in issue applies only to suits against the United States. Pet. App. A13.

The court next determined that Congress intended the VRRRA to authorize awards of prejudgment interest against the States, as an element of the compensatory relief. Noting that the Act requires employers—

specifically including the States—to “compensate” injured employees “for any loss of wages or benefits” sustained in consequence of a violation of the VRRRA, the court held that full compensation for lost wages would require the payment of interest. Pet. App. A20. The court added that courts have consistently interpreted the VRRRA to provide for interest awards against private employers, and that Congress extended the remedial provisions of Section 2022 to state employers on the same terms as they applied to private employers. Pet. App. A22-A24.

DISCUSSION

The opinion of the court of appeals is correct and consistent with the decisions of other courts of appeals and of this Court. Further review is therefore unwarranted.

1. The governing principles are not in dispute. Because respondent sought retrospective monetary relief for the petitioner’s violation of his rights, this case directly implicates the Eleventh Amendment. Absent a waiver of sovereign immunity by petitioner, therefore, respondent may maintain this action in federal court only if Congress abrogated petitioner’s sovereign immunity “by making its intention unmistakably clear in the language of the statute.” *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); see, e.g., *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989).

The VRRRA effects such a waiver. The Act originated with Congress’s determination that one “who was called to the colors [is] not to be penalized on his return by reason of his absence from his civilian job.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946). The statute forbids, as well,

an employer's imposition of penalties upon those who, like respondent, choose to serve the United States in the armed forces reserves. 38 U.S.C. 2021(b)(3); see *Monroe v. Standard Oil Co.*, 452 U.S. 549, 556-560 (1981). To implement those guarantees, the VRRRA, which "is to be liberally construed for the benefit of those who [leave] private life to serve their country," *Fishgold*, 328 U.S. at 285, has from its earliest form authorized the federal courts to order the Act's violators to "compensate [a covered] person for any loss of wages or benefits suffered by reason of [an] employer's unlawful action." Selective Training and Service Act of 1940, ch. 720, § 8(e), 54 Stat. 885, 891.

Prejudgment interest on lost wages comprises one element of the compensatory remedy. As this Court has explained in other contexts, "[p]rejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virginia v. United States*, 479 U.S. 305, 310-311 n.2 (1987); accord *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 654 (1983). Indeed, referring to the backpay award authorized by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(g)—relief that is closely analogous to the compensation for lost wages authorized by the VRRRA—this Court has expressly recognized that "[p]rejudgment interest, of course, is 'an element of complete compensation.'" *Loeffler v. Frank*, 486 U.S. 549, 558 (1988). In the context of the VRRRA, the courts of appeals have considered prejudgment interest so central to the Act's compensatory purpose that they have found it an abuse of dis-

cretion to deny such interest, even when the employer has acted in good faith. See, *e.g.*, *Hanna v. American Motors Corp.*, 724 F.2d 1300, 1311 (7th Cir.), cert. denied, 467 U.S. 1241 (1984); *Hembree v. Georgia Power Co.*, 637 F.2d 423, 429-30 (5th Cir. 1981).

In 1974, Congress extended the Act to state employers, Pub. L. No. 93-508, § 404(a), 88 Stat. 1478, 1596, and, in so doing, abrogated state sovereign immunity by unequivocally clear language. The VRRRA now reads in relevant part as follows:

If any employer, *who is a private employer or a State or political subdivision thereof*, fails or refuses to comply with the provisions of [the Act], the [appropriate] district court of the United States * * * shall have the power * * * specifically to require such employer * * * to compensate [a covered] person for any loss of wages or benefits suffered by reason of such employer's unlawful action.

38 U.S.C. 2022 (emphasis added). Petitioner does not dispute that the foregoing provision abrogates state sovereign immunity, and extends the district court's authority to award backpay as make-whole relief against the States. Rather, petitioner argues that Congress stopped short of extending the district court's authority to award prejudgment interest as part of the complete compensation for lost wages.

That contention, however, is not supported by the statutory language. The Act draws no distinction between private and state employers for purposes of the remedial provisions of Section 2022, but subjects "any employer, who is a private employer or a State or political subdivision thereof," to the full panoply of available remedies. It is not surprising, therefore,

that lower courts have routinely awarded prejudgment interest against state government employers under the Act. See, e.g., *Jennings v. Illinois Office of Educ.*, 589 F.2d 935, 937 (7th Cir.), cert. denied, 441 U.S. 967 (1979); *Peel v. Florida Dep't of Transp.*, 500 F. Supp. 526, 528 (N.D. Fla. 1980). As petitioner concedes, moreover, the holding of the present case is uncontradicted by the decision of any other court of appeals. Pet. 15 n.6.

The legislative history of the 1974 amendment confirms that States are to be subject to the same remedies as private employers under the VRRRA. In discussing 38 U.S.C. 2022, the Senate Report noted that the 1974 amendment "extends to employees of State * * * governments * * * enforcement rights *in the same manner and to the same extent as* are currently provided for employees of private employers." S. Rep. No. 907, 93d Cong., 2d Sess. 111 (1974) (emphasis added). That report also explained that Congress sought to extend "full coverage to veterans who were employed by States and their political subdivisions." *Id.* at 109. Hence, that amendment is properly understood to subject the States to the district court's remedial power to award full compensation for lost wages, including prejudgment interest, under the VRRRA.

2. Petitioner seeks to avoid the VRRRA's authorization of prejudgment interest by extending to federal statutes abrogating *state* sovereign immunity this Court's presumption that Congress does not intend to subject the *federal* government to an award of interest, absent express references to interest. That contention also does not warrant review.

a. The special "no-interest rule" recently reaffirmed by this Court in *Library of Congress v. Shaw*, 478 U.S. 310 (1986), does not apply to congression-

ally created remedies against state governments. As this Court made clear in *Missouri v. Jenkins*, *supra*, the “special no-interest rule” is “applicable to the immunity of the United States and * * * provides an ‘added gloss of strictness’ * * * only where the United States’ liability for interest is at issue.” 491 U.S. at 281 n.3.

While petitioner argues that the relevant passage from *Missouri v. Jenkins* was dictum, Pet. 21, that characterization is incorrect. In that case, the State resisted the inclusion of an interest component in an award of attorney’s fees assessed against it as “costs.” Relying on *Shaw*, 478 U.S. at 321, the State argued that interest was not a component of costs. *Missouri v. Jenkins*, 491 U.S. at 281 n.3. This Court responded that its observation in *Shaw* that interest was not an element of costs could properly be understood only in the context of the no-interest rule, which applied only to the federal government, and not the States. *Ibid.* Hence, the distinction between the federal, and a state, government for purposes of the no-interest rule, was necessary to respond to an argument, the success of which would have dictated a contrary result in *Missouri v. Jenkins*.

In any case, the distinction drawn in *Jenkins* ~~Court~~ between the applicability of the no-interest rule to congressional waivers of federal, as opposed to state, sovereign immunity is correct. The federal no-interest rule, as such, dates back to at least 1819 and appears in numerous decisions of this Court starting in 1879. See *Shaw*, 478 U.S. at 315-317. In view of that lengthy history, “[w]hen Congress has intended to waive the United States’ immunity with respect to interest, it has done so expressly; thus, waivers of sovereign immunity to suit must be read against the

backdrop of the no-interest rule.”⁴ *Id.* at 318-319; accord *United States ex rel. Angarica v. Bayard*, 127 U.S. 251, 260 (1888) (“Congress, though well knowing the [no-interest] rule observed at the Treasury, and frequently invited to change it, has refused to pass any general law for the allowance and payment of interest on claims against the government.”). Petitioner has not cited, and we are unaware of, any traditional no-interest rule that applies to congressional legislation concerning the immunity of the States. See *Missouri v. Jenkins*, 491 U.S. at 281 n.3 (rejecting the asserted “existence of an equivalent rule relating to State immunity that embodies the same ultrastrict rule of construction for interest awards that has grown up around the federal no-interest rule”).

b. Consistent with the distinction drawn by *Missouri v. Jenkins*, the decisions of the lower courts have routinely awarded interest under federal statutes that authorize compensatory relief against the States, even though the statutes do not expressly state

⁴ Because of the no-interest rule, statutes—such as the VRRRA, 38 U.S.C. 2023(a)—that simply authorize compensatory relief against the federal government do not thereby authorize prejudgment interest as an element of complete compensation. See, e.g., *United States v. Tillamooks*, 341 U.S. 48, 49 (1951) (no waiver of federal immunity against interest found in congressional authorization to recover “just compensation”); *Tillson v. United States*, 100 U.S. 43, 45, 47 (1879) (interest award against the federal government not authorized by statute establishing liability for the “amount equitably due”). Rather, Congress must explicitly and separately specify the availability of prejudgment interest. See, e.g., *Shaw*, 478 U.S. at 314-317.

that interest is available.⁵ See, e.g., *Whiting v. Jackson State University*, 616 F.2d 116, 127 n.8 (5th Cir. 1980) (Title VII); *Jennings*, 589 F.2d at 937 (VRA); *Gelof v. Papineau*, 648 F. Supp. 912, 929-931 (D. Del. 1986) (Age Discrimination in Employment Act), vacated on other grounds, 829 F.2d 452 (3d Cir. 1987); *Peel*, 500 F. Supp. at 528 (VRA).

In addition to the decision in this case, moreover, recent decisions of two other courts of appeals have expressly considered and rejected the claim, advanced by petitioner here, that *Shaw's* no-interest rule requires Congress to authorize interest against the States explicitly and separately from the authorization to sue the States for compensatory relief. See *Pegues v. Mississippi State Employment Service*, 899 F.2d 1449, 1453-1454 (5th Cir. 1990); *Jenkins v. Missouri*, 838 F.2d 260, 265 (8th Cir. 1988), *aff'd* on other grounds, 491 U.S. 274 (1989). Thus, as petitioner concedes, Pet. 15 n.6, there is no split in authority on the applicability, *vel non*, of the no-interest rule to congressional abrogations of Eleventh Amendment immunity. Further review is unwarranted.

⁵ Prior to *Missouri v. Jenkins*, the First Circuit had extended the federal no-interest rule of *Shaw* to cases involving Eleventh Amendment immunity. See *Rogers v. Okin*, 821 F.2d 22, 26-28 (1987), *cert. denied*, 484 U.S. 1010 (1988). In the present case, the First Circuit abandoned that approach in reliance on *Jenkins*. Pet. App. A11-A14.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1991